UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| DENNIS MARKEY,<br><br>Plaintiff,<br><br>v.<br><br>CAROLYN W. COLVIN, Acting Commissioner of Social Security,<br><br>Defendant. | CASE NO. C13-1393-JLR-MAT<br><br>REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL |

Plaintiff Dennis Markey proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda, the Court recommends this matter be REMANDED for further administrative proceedings.

## FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1949.[1] He completed three years of college, and

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

previously worked as a mail sorter and in temporary jobs as a warehouse worker, shipping packager, stocker, bartender, retail clerk, and medical supply technician. (AR 83-84, 87, 235.)

Plaintiff filed applications for DIB and SSI in June 2010, alleging disability since May 1, 1999. (AR 24, 198-209.) His applications were denied initially and on reconsideration, and he timely requested a hearing.

ALJ Cheri L. Filion held a hearing on January 12, 2012, taking testimony from plaintiff and a vocational expert (VE). (AR 40-97.) At the hearing, plaintiff amended his alleged onset date to September 30, 2003. (AR 24, 43.) On April 23, 2012, the ALJ rendered a decision finding plaintiff not disabled. (AR 21-39.) Plaintiff timely appealed.

The Appeals Council denied plaintiff's request for review on June 7, 2013 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

## JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

## DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since September 30, 2003, the amended onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found that through plaintiff's date last insured (DLI) of September 30, 2003, plaintiff's

hypertension, depression, and substance abuse in remission were non-severe, and that his right shoulder problems did not develop until 2008. The ALJ found, however, that since June 10, 2010, the date of plaintiff's SSI application, plaintiff's osteoarthritis of the right shoulder, dysthymia, and episodic major depressive disorder were severe. She found a variety of other impairments non-severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC to perform medium work, with the exception that he could perform occasional reaching overhead with the right upper extremity. The ALJ also limited plaintiff to simple, repetitive tasks. The ALJ found plaintiff had no past relevant work because his work within the past 15 years was not performed at substantial gainful activity level.

If a claimant demonstrates an inability to perform past relevant work or he has no past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. With consideration of the Medical-Vocational Guidelines ("the grids"), the ALJ concluded there were jobs existing in significant numbers in the national economy plaintiff could perform. The ALJ, therefore, concluded plaintiff was not disabled at any time from the alleged onset date through the date of the decision.

This Court's review of the final decision is limited to whether the decision is in

accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erred in (1) finding depression non-severe prior to the DLI; (2) erroneously evaluating the medical opinion evidence; (3) failing to incorporate all functional limitations into his RFC; (4) failing to discuss the disability determination by the Department of Veteran's Affairs (VA); and (5) relying on the grids at step five, rather than the testimony of a VE. He requests remand for further administrative proceedings. The Commissioner maintains the ALJ's decision has the support of substantial evidence and should be affirmed.

Step Two

At step two, a claimant must make a threshold showing that his medically determinable impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§ 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996 (quoting Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a de minimis

screening device to dispose of groundless claims." *Id*. (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the "combined effect" of an individual's impairments in considering severity. *Id*.

A diagnosis alone is not sufficient to establish a severe impairment. Instead, a claimant must show that his medically determinable impairments are severe. 20 C.F.R. §§ 404.1520(c), 416.920(c). Also, the failure to list impairment as severe at step two may be deemed harmless where associated limitations are considered at step four. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).

Plaintiff challenges only the ALJ's step two finding that plaintiff's depression was not severe through the DLI, September 30, 2003. The ALJ discussed the sparse medical evidence prior to the DLI, which included a psychiatric evaluation in December 2002. (AR 27, 421-425.) At the evaluation, plaintiff complained of a loss of motivation, continual feelings of depression, lack of energy, and residual anger. (AR 421.) He reported having been diagnosed with major depression five years previously and that medications had been minimally successful. (*Id.*) Plaintiff further reported that he sees his 17-year-old son weekly, communicates with his daughter through e-mail, and regularly communicates with other veterans through the internet. (AR 423.) He also reported that he enjoys writing and was working on a book of short stories. (*Id.*) On mental status exam, plaintiff was alert, attentive, and cooperative; he had appropriate grooming, wide range affect, and normal speech; his thought process was circumstantial and he had "flight of ideas"; his insight, judgment, and memory were good; and he was able to stay focused. (AR 424.) He was diagnosed with depressive order. (AR 425.) As the ALJ noted, plaintiff was scheduled for a follow-up

appointment, but did not keep that appointment. (AR 27, 420.)

The ALJ found that the evidence before September 30, 2003, established, at most, mild limitations in activities of daily living, social functioning, and concentration, persistence, or pace. (AR 27.) The ALJ found that plaintiff's lack of treatment for depression suggested "that his symptoms were transient and not that severe." (*Id.*) The ALJ noted that plaintiff's December 2002 mental status exam was unremarkable and showed good social and cognitive functioning. (*Id.*) The ALJ also found that plaintiff's activities indicated intact mental functioning. (*Id.*)

Plaintiff does not challenge the ALJ's treatment of the medical evidence prior to the DLI. Rather, he contends that the ALJ erred because she failed to discuss relevant evidence from after the DLI, specifically a treatment note from 2005 (AR 407-08) and a psychological evaluation by Phyllis Sanchez, Ph.D., in 2006 (AR 516-523). *See Smith v. Bowen*, 849 F.2d 1222, 1225-26 (9th Cir. 1988) (holding that post-DLI evidence can be relevant to evaluation of the pre-DLI condition); *accord Lingenfelter v. Astrue*, 504 F.3d 1028, 1034 n.3 (9th Cir. 2007).

The 2005 treatment note provides no suggestion of retrospective application, and therefore the ALJ did not err by failing to consider it. (*See* AR 407-08.) The Court, however, cannot say the same about Dr. Sanchez's report. Dr. Sanchez diagnosed plaintiff with major depression and opined that he had moderate or marked limitations in his judgment and decision-making abilities, ability to perform routine tasks, and social abilities. (AR 517-18.) She explained that her opinion of marked limitation in plaintiff's judgment was based on the fact that he "stops going to work because too depressed even though knows he will lose job because of it." (AR 518 (emphasis in original).) She supported her opinion of social

limitations by citing the fact that plaintiff lost 12 jobs in 12 years because he would stop going to work because of depression. (*Id.*) Given that Dr. Sanchez's explanations for her opinions looked back over the previous 12 years and multiple job losses due to depression, her report could support a finding that plaintiff's depression had more than a minimal effect on his ability to perform basic work activities prior to the DLI, even though it was rendered nearly three years later. The ALJ, therefore, erred by failing to consider it in deciding whether plaintiff established that depression was a severe impairment prior to his DLI.

Nevertheless, the Court concludes that the ALJ's failure to consider Dr. Sanchez's opinions at step two was a harmless error.[2] There is no indication that Dr. Sanchez reviewed plaintiff's medical record, and therefore her retrospective opinions were based on plaintiff's self-reports. The ALJ discounted plaintiff's credibility, a finding plaintiff does not challenge. "An ALJ may reject a treating [or examining] physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999)). Accordingly, looking at the record as a whole, the Court deems the ALJ's failure to discuss Dr. Sanchez's opinions at step two to be "inconsequential to the ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (quoted sources omitted).

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2 As discussed later in this report, the ALJ considered Dr. Sanchez's opinion in assessing plaintiff's RFC but rejected it because it was rendered several years prior to the SSI application date. The Court, however, does not rely on this discussion to find the ALJ's step two error harmless, *see Lewis*, 498 F.3d at 911 (failure to find impairment severe at step two may be harmless where associated limitations are considered at step four), because the ALJ's reasoning related to the SSI application date is not sufficient to discount Dr. Sanchez's opinion as it relates to plaintiff's DIB application.

Physicians' Opinions

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

In this case, plaintiff argues error in the ALJ's consideration of opinion evidence from treating psychiatrist Carl Jensen, M.D.; examining psychologists Phyllis N. Sanchez, Ph.D., and Victoria McDuffee, Ph.D.; and non-examining doctors Robert Bernardez-Fu, M.D., and Dale Thuline, M.D.

A. Dr. Carl Jensen

On January 20, 2011, Dr. Jensen examined plaintiff and diagnosed him with dysthymic disorder.[3] (AR 461.) Dr. Jensen originally assessed a GAF score of 65, and then crossed it out on January 31, 2011, and assessed a GAF score of 40. (*Id.*) He opined plaintiff's symptoms of sad mood, insomnia, poor energy, and poor motivation had a marked impact on his ability to work, specifically that they made it difficult for plaintiff to engage with goals, be

3 Dr. Jensen was one of plaintiff's treating doctors, however January 20, 2011, was the first time he saw plaintiff. (AR 500.)

rested, complete tasks, and engage with people. (AR 460.) Dr. Jensen opined plaintiff had marked limitations in his abilities to relate appropriately to co-workers and supervisors, interact appropriately in public contacts, respond appropriately to and tolerate the pressures and expectations of a normal work setting, and to maintain appropriate behavior in a work setting. (AR 462.) He opined plaintiff had moderate limitations in his abilities to understand, remember and follow complex instructions, learn new tasks, exercise judgment, and make decisions, and that plaintiff had mild limitations in his abilities to perform routine tasks and care for self. (*Id.*) Dr. Jensen stated that plaintiff "is not able to maintain or complete organized tasks." (*Id.*)

The ALJ gave little weight to Dr. Jensen's opinion:

> First, Dr. Jensen did not administer a mental status examination. His opinion is therefore based solely on the claimant's subjective report, which, as discussed above, is not fully credible. I therefore accord greater weight to Dr. Ronay's opinion, which was performed three months earlier and is supported by a mental status examination. Second, in the DSHS form he completed, Dr. Jensen inexplicably crossed out the GAF score of 65 and replaced it with a GAF score of 40. I note that this change is internally inconsistent with Dr. Jensen's treatment notes in January 2011, which document a GAF score of 65 (8F35). I also note that, when Dr. Jensen saw the claimant in January 2011, it was their first meeting together. Subsequent counseling records from the VA through September 2011 consistently document a GAF score of 55, indicating moderate symptoms (14F). Because a GAF score of 55 presents a more accurate longitudinal picture of the claimant's mental functioning, I give it greater weight.

(AR 33.)

Plaintiff contends that the ALJ improperly rejected Dr. Jensen's opinion as based on claimant's subjective report because Dr. Jensen's opinion specifically references his review of VA chart notes and plaintiff's history of depression. (AR 459.) Plaintiff also asserts that Dr.

Ronay's report, which the ALJ favored over Dr. Jensen's report, does not contradict Dr. Jensen's opinions. Plaintiff further argues that the ALJ's determination that the GAF scores are inconsistent is not a basis for rejecting Dr. Jensen's conclusions regarding plaintiff's functional limitations, which are not contradicted by any treating physician. Finally, plaintiff argues that the ALJ mischaracterized Dr. Jensen as an evaluating, rather than a treating physician.

Plaintiff is correct that substantial evidence does not support the ALJ's finding that Dr. Jensen's opinion was based "solely" on plaintiff's subjective report. Dr. Jensen's report indicates that he reviewed plaintiff's chart notes from the Veterans Hospital, observed plaintiff's "sad mood" and "poor motivation," and based his GAF score on "mental status exam and hx in chart." (AR 459-461.) Nevertheless, as discussed below, additional valid reasons support the ALJ's rejection of Dr. Jensen's opinion, and therefore this error was harmless. *See Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

The ALJ properly assigned less weight to Dr. Jensen's opinion because Dr. Ronay's contrary opinion was supported by a mental status exam. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (contrary opinions of examining and non-examining physicians serve as specific and legitimate reasons). As an initial matter, the ALJ reasonably found that Dr. Jensen's opinion was not supported by a contemporaneous mental status exam. *See Morgan*, 169 F.3d at 599 ("Where the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld.") (citing *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)). Despite Dr. Jensen's notation that the GAF score was based on a mental status exam, the "mental status findings" in Dr. Jensen's January 20, 2011 chart

note are cursory and do not assess plaintiff's thought processes, cognitive abilities, judgment, or insight. (*Compare* AR 501 (Dr. Jensen's 1/20/11 chart note), *with* AR 437-38 (Dr. Ronay's mental status exam).)

Moreover, plaintiff's does not challenge the ALJ's decision to give great weight to Dr. Ronay's opinion. Dr. Ronay found plaintiff to be "an intelligent man with dysthymia which results in poor motivation." (AR 438.) She opined that "[d]espite his obstacles, the patient has good concentration (for instance he can read for hours and can do calculations), is able to interact socially, and is able to make good judgment calls. He is able to follow simple and complex commands." (*Id.*) These opinions are inconsistent with Dr. Jensen's opinions summarized above. Plaintiff nevertheless contends that Dr. Ronay's opinion does not contradict Dr. Jensen's opinion that plaintiff is limited in his ability to tolerate employment settings. Although Dr. Ronay did not specifically opine that plaintiff would be able to tolerate employment settings, that inference is reasonably drawn from her report. *See Magallanes*, 881 F.2d at 755 (court may draw inferences relevant to doctors' findings and opinions). As such, the Court concludes that the ALJ's decision to give more weight to Dr. Ronay's opinion than to Dr. Jensen's opinion is supported by substantial evidence.

Substantial evidence also supports the ALJ's rejection of Dr. Jensen's GAF score of 40 because it was inconsistent with Dr. Jensen's treatment notes and subsequent treatment notes from the VA hospital. (AR 33, 499 (1/20/11 GAF of 65), 543-52 (GAF of 55 on 4/21/11, 5/12/11, 6/10/11, and 7/7/11).) *See Morgan*, 169 F.3d at 603 (ALJ appropriately considers internal inconsistencies within and between physicians' reports). Plaintiff does not challenge the ALJ's determination that Dr. Jensen's GAF score was inconsistent, but rather argues that

rejection of a GAF score does not provide a basis for rejecting functional limitations. Even if plaintiff is correct, however, his argument does not establish a basis for remand because, as discussed, the ALJ properly rejected Dr. Jensen's opinion in favor of Dr. Ronay's opinion. *See Carmickle*, 533 F.3d at 1163 (error is harmless so long as substantial evidence supports the ALJ's conclusions and the error does not negate the validity of the ALJ's ultimate conclusion).

Finally, plaintiff's argument that the ALJ mischaracterized Dr. Jensen as an evaluating physician is not supported by the record. Although the ALJ described Dr. Jensen as a "DSHS examiner," she also discussed Dr. Jensen's treatment notes and recognized that plaintiff had more than one visit with Dr. Jensen. (AR 33.)

In sum, because the ALJ identified specific and legitimate reasons supported by substantial evidence to reject Dr. Jensen's opinion, plaintiff has not shown that the ALJ erred in assessing his opinion.

B. Dr. Phyllis N. Sanchez

Dr. Sanchez examined plaintiff in June 2006 and opined he had either moderate or marked limitations in his abilities to exercise judgment and make decisions, perform routine tasks, relate appropriately to co-workers and supervisors, interact appropriately in public contacts, respond appropriately to and tolerate the pressures and expectations of a normal work setting, care for self, and maintain appropriate behavior. (AR 518.) The ALJ gave the opinion little weight because it was issued more than four years before his SSI application. (AR 32 n.1.)

Plaintiff contends that the ALJ failed to provide any clear and convincing reason to reject Dr. Sanchez's conclusions. The Court, however, agrees with the Commissioner that

although evidence that predates an application date may be relevant, the ALJ did not err because Dr. Sanchez's opinion was remote in time and the ALJ fully considered the more recent psychological evaluations that are more relevant to plaintiff's current functioning. *See Brown v. Comm'r of Soc. Sec.*, No. 11-17394, 2013 WL 3213351, at *1 (9th Cir. Jun. 26, 2013) (affirming the Commissioner because the ALJ "properly rejected the testimony of 'some older (pre-current application) assessments' in favor of 'more recent' opinions"); *Carmickle*, 533 F.3d at 1165 ("Medical opinions that predate the alleged onset of disability are of limited relevance."). Accordingly, plaintiff has not shown that the ALJ erred in assessing Dr. Sanchez's opinion.

C. Dr. Victoria McDuffee

The ALJ gave little weight to the opinion of Dr. McDuffee, who examined plaintiff in February 2010. (AR 32, 298-307.) Plaintiff makes the conclusory argument that the ALJ failed to provide "legitimate reasons supported by substantial record evidence" for rejecting Dr. McDuffee's opinion. (Dkt. 15 at 14.) Plaintiff provides a brief summary of Dr. McDuffee's report, but he does not discuss any of the four reasons the ALJ gave for discounting the doctor's opinion. (*See id.*; AR 32.) As plaintiff's challenge regarding Dr. McDuffee is not argued with any specificity, the Court considers the claim forefited. *See Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) (court will not consider any claims that were not specifically and distinctly argued in a party's opening brief); *see also Vandenboom v. Barnhart*, 421 F.3d 745, 750 (8th Cir. 2005) (rejecting out of hand conclusory assertion that ALJ failed to consider whether claimant met listings because claimant provided no analysis of relevant law or facts regarding listings); *Perez v. Barnhart*, 415 F.3d 457, 462 n.4 (5th Cir. 2005) (argument

waived by inadequate briefing). It is not enough merely to present an argument in the skimpiest way, and leave the Court to do counsel's work—framing the argument and putting flesh on its bones through a discussion of the applicable law and facts. *See, e.g.*, *Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) (perfunctory statements fail to frame and develop issue sufficiently to invoke appellate review).

D. Dr. Robert Bernardez-Fu and Dr. Dale Thuline

In October 2010, Dr. Bernardez-Fu reviewed plaintiff's medical records, including a right shoulder x-ray from April 2008, which showed joint space narrowing and inferior humeral osteophytosis at the glenhumeral joint, as well as mild osteoarthritis at the right acromioclavicular joint. (AR 435.) He opined that plaintiff was limited to light work with frequent overhead reaching with the right upper extremity, among other postural limitations. (AR 428-35.) In March 2011, Dr. Thuline reviewed the medical evidence and affirmed Dr. Bernardez-Fu's opinion regarding plaintiff's functional limitations. (AR 511.)

The ALJ declined to adopt the reviewing doctors' opinions that plaintiff was limited to light work because of plaintiff's "active lifestyle, which includes bicycling hundreds to thousands of miles annually," and because of plaintiff's medium exertional work in 2008 as a pharmacy technician, a job plaintiff quit for non-medical reasons. (AR 32.) The ALJ also declined to adopt the doctors' opinion that plaintiff could frequently reach overhead and instead found that he was limited to occasional overhead reaching with the right upper extremity based on updated x-rays from January 2011, which revealed some progression of the shoulder arthritis. (*Id.*)

Plaintiff contends that the ALJ erred because the reviewing doctors' opinions are

supported by plaintiff's treatment records, function reports, and hearing testimony, which establish that his shoulder pain interfered with his daily activities and eventually precluded his ability to ride his bike. Plaintiff faults the ALJ for citing only plaintiff's past ability to ride a bike to contradict all of the medical evidence. The Commissioner responds that the ALJ's proffered reasons provide substantial evidence to support her rejection of the reviewing doctors' opinions. The Commissioner also notes that none of plaintiff's doctors' notes contain information that would support lifting limitations consistent with light work.

The Court agrees with the Commissioner. An ALJ may properly reject a physician's opinion upon finding it inconsistent with a claimant's level of activity. *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001). While plaintiff takes a contrary view of the evidence of his activities, he fails to demonstrate the ALJ's conclusion that those activities were inconsistent with the reviewing doctors' opinions was not rational. In particular, plaintiff wholly fails to address the ALJ's finding that plaintiff performed medium work in 2008, during the time period when shoulder x-rays confirmed his arthritis. Moreover, although plaintiff supports his position with his own hearing testimony, he fails to challenge the ALJ's adverse credibility determination. The ALJ provided specific and legitimate reasons for rejecting the opinion evidence from the reviewing doctors and, therefore, her consideration of that evidence need not be disturbed.

Residual Functional Capacity

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess his work-related abilities on a function-by-function basis, including a required narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can

do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider the limiting effects of all of plaintiff's impairments, including those that are not severe, in determining his RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

Plaintiff contends that the ALJ's RFC fails to account for all of his exertional and mental impairments. First, plaintiff contends that the ALJ should have limited him to light work based on the medical evidence and the reviewing doctors' opinions. He relies on right shoulder x-rays from 2008 and 2011 (AR 435, 465), treatment records illustrating chronic right shoulder pain (AR 342-44) and decreased range of motion, and the fact that he received steroid injections in his shoulder (AR 476-79). This evidence, however, fails to establish that the ALJ's RFC assessment is an unreasonable interpretation of the record as a whole. As noted above, the ALJ properly rejected the reviewing doctors' opinions. The ALJ also considered that the x-rays from 2008 and 2011 "revealed some progression" of plaintiff's shoulder arthritis, and accordingly limited him to occasional overhead reaching in his right upper extremity, despite the opinion of the reviewing doctors that plaintiff could frequently reach overhead. The ALJ summarized the medical evidence, which included reports of mild shoulder pain on range of motion in April 2008 (AR 387), decreased range of motion in June 2009 but no pain on palpation (AR 353), full range of motion and 5/5 motor strength in January 2011 but mild tenderness to palpation (AR 495-96), and reduced range of motion two weeks later but no signs of synovitis, sensory deficits, weakness, or atrophy (AR 488-89). Although the medical evidence reveals some limitation from plaintiff's right shoulder arthritis, the Court cannot say that the ALJ was unreasonable in concluding that plaintiff could perform medium work. *See Morgan*, 169 F.3d at 599 ("Where the evidence is susceptible to more than one

rational interpretation, it is the ALJ's conclusion that must be upheld.") (citation omitted).

Next, plaintiff argues that the ALJ failed to consider his obesity in combination with his other impairments in determining his RFC. He cites the fact that he has been diagnosed with obesity and suffers from resulting sleep and breathing problems. (*See* AR 329-30.) Yet plaintiff fails to point "to any evidence of functional limitations due to obesity which would have impacted the ALJ's analysis." *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). He also fails to assign error with the ALJ's finding that his sleep apnea would be controlled by use of a CPAP device. (AR 28.) As such, plaintiff fails to establish that obesity, considered alone or in combination with his other impairments, results in greater functional limitations than accounted for in the RFC.

Finally, Plaintiff asserts that the ALJ erroneously failed to account for his mental impairments in assessing his RFC. Plaintiff challenges the ALJ's finding that his mental condition has been "stable with medication and counseling" and the RFC's limitation to simple, repetitive tasks. He relies on his hearing testimony that he is no longer productively writing, only bathes occasionally, and has been unable to maintain his apartment in acceptable condition. Again, however, plaintiff fails to establish that the ALJ's interpretation of the record is unreasonable or lacking in supportive evidence. *See Morgan*, 169 F.3d at 599. Plaintiff does not challenge the ALJ's reliance on Dr. Ronay's opinion, which supports the RFC, or the ALJ's adverse credibility finding, which entitles the ALJ to assess an RFC that is less restrictive than plaintiff's testimony would indicate.

In sum, plaintiff has not shown that the ALJ erred in assessing his RFC.

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VA Disability Rating Decision

The record contains a VA disability rating decision from October 2011. (AR 568-72.) The second page of the disability decision, which appears to have summarized the medical evidence supporting the disability rating, is not in the record.[4] (*See* AR 568-69.) Plaintiff presented this evidence for the first time to the Appeals Council, which made it part of the record. (AR 4.) *See Harman v. Apfel*, 211 F.3d 1172, 1180-81 (9th Cir. 2000) (evidence submitted to the Appeals Council becomes part of the administrative record for the purposes of judicial review); *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996); *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9th Cir. 1993). The Court reviews such evidence pursuant to "sentence four" of 42 U.S.C. ' 405(g): "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." *See Andersen v. Barnhart*, No. C02-2174-RSL, slip op. at 1-3 (W.D. Wash. Nov. 21, 2003) (Dkt. 26); *Ramel v. Barnhart*, No. C05-1913-RSL-MAT, slip op. at 11-14 (W.D. Wash. Aug. 4, 2006) (Dkt. 18). The Court must, therefore, determine whether there is substantial evidence to support the ALJ's decision even taking the VA disability rating decision into consideration.

Plaintiff contends that remand is necessary because the VA disability determination must be considered by the ALJ and ordinarily given great weight. *See McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (ALJ must ordinarily give "great weight" to a VA determination of disability). If the VA decision is given great weight, according to plaintiff, it

4 It appears plaintiff's counsel is aware of the missing page because in her motion to the Appeals Council, she noted that "the enclosed proposed Exhibit is the entire exhibit made available to Counsel. If additional and more complete evidence becomes available, it will also be submitted." (AR 566.)

would change the ultimate disability determination. Plaintiff does not elaborate on these arguments.

The Court is not persuaded that the VA decision undermines the substantial evidence supporting the ALJ's decision. The VA assigned a 10% disability rating for left hip bursitis based on "limited or painful motion" (AR 569), which does not undercut the ALJ's finding that hip impairment was not medically established based on unremarkable objective findings and the lack of treatment (AR 28). The VA assigned a 20% disability rating for right shoulder arthritis based on "limitation of arm motion midway between side and shoulder level or for limitation of arm motion at shoulder level." (AR 569.) This finding is not supported by the medical evidence in the record or the opinions of the reviewing doctors, who opined plaintiff could frequently reach overhead with his right upper extremity. The VA assigned a 30% disability rating for depression with insomnia based on "occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed moot, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)." (*Id.*) This finding lacks supporting evidence, unlike the non-exertional limitation in the ALJ's RFC, which is supported by the opinion of Dr. Ronay. Finally, the VA assigned a 50% disability rating for obstructive sleep apnea based on the fact that plaintiff was prescribed a CPAP machine (*id.*), however, as noted above, the ALJ found that plaintiff's sleep apnea would be controlled once he began using the CPAP machine, a finding that plaintiff does not challenge (AR 28).

Because substantial evidence supports the ALJ's decision even when taking into account the VA determination, plaintiff has not shown that remand is necessary so that the ALJ can consider the new evidence in the first instance.

Step Five

The Medical-Vocational Guidelines or "grids" present a short-hand method for determining the availability and numbers of suitable jobs for claimants, addressing factors relevant to a claimant's ability to work, such as age, education, and work experience. *See* 20 C.F.R. Pt. 404, Subpt. P, App 2. Their purpose is to streamline the administrative process and encourage uniform treatment of claims. *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999).

An ALJ may rely on the grids to meet her burden at step five. *Burkhart v. Bowen*, 856 F.2d 1335, 1340 (9th Cir. 1988). "They may be used, however, 'only when the grids accurately and completely describe the claimant's abilities and limitations.'" *Id*. (quoting *Jones v. Heckler*, 760 F.2d 993, 998 (9th Cir. 1985)). "When a claimant's non-exertional limitations are 'sufficiently severe' so as to significantly limit the range of work permitted by the claimant's exertional limitations, the grids are inapplicable[]" and the testimony of a VE is required. *Id*. (quoting *Desrosiers v. Sec. of Health & Human Servs.*, 846 F.2d 573, 577 (9th Cir. 1988)); *accord Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007) ("[A]n ALJ is required to seek the assistance of a vocational expert when the non-exertional limitations are at a sufficient level of severity such as to make the grids inapplicable to the particular case.").

The existence of a non-exertional limitation does not automatically preclude application of the grids. *Desrosiers*, 846 F.2d at 577; *see also* SSR 83-14 ("Nonexertional impairments . . . may or may not significantly narrow the range of work a person can do."); *Razey v. Heckler*,

785 F.2d 1426, 1430 (9th Cir. 1986) ("The regulations . . . explicitly provide for the evaluation of claimants asserting both exertional and nonexertional limitations. [20 C.F.R. Pt. 404, Subpt. P, App. 2] at § 200.00(e)."), *modified at* 794 F.2d 1348 (1986). Instead, the ALJ must determine whether the non-exertional limitations are "'sufficiently severe' so as to significantly limit the range of work permitted by the claimant's exertional limitations[.]" *Burkhart*, 856 F.2d at 1340 (quoting *Desrosiers*, 846 F.2d at 577). If so, the grids are inapplicable and the testimony of a VE is required. *Id*.

Plaintiff maintains that the ALJ erred at step five by relying on the grids because he has "significant non-exertional impairments," namely cognitive limitations to simple, repetitive tasks and limited overhead reaching. The Commissioner responds that the limitation to simple, repetitive tasks did not necessitate VE testimony because the basic demands of unskilled work include, among other things, the ability to "understand, carry out, and remember simple instructions." SSR 85-15. The Commissioner also contends that the ALJ was not required to call a VE based on the limitation to occasional overhead reaching on the right. *See Summers v. Comm'r of Soc. Sec.*, No. CIV S-08-1309-CMK, 2009 WL 2051633, at *23 (E.D. Cal. Jul. 10, 2009) (limitation to no frequent forceful overhead reaching with left upper extremity did not require VE testimony); *Martin v. Barnhart*, No. CV F 05-0862 LJO, 2006 WL 1748589, at *17 (E.D. Cal. Jun. 26, 2006) (limitation to occasional overhead reaching on the right did not require VE testimony). Furthermore, the Commissioner points out that SSR 83-14 does not state that restrictions on occasional overhead reaching would affect an individual's occupational base for medium work. *See* SSR 83-14.

The Court agrees with the Commissioner on the first issue and with plaintiff on the

second issue. As the Commissioner argues, the limitation to simple, repetitive tasks does not significantly erode the occupational base of unskilled medium work because it corresponds with the requirements for unskilled work, as set forth in SSR 85-15. Plaintiff is correct, however, that the ALJ erred by failing to call a VE because the nonexertional limitation to only occasional overhead reaching with the right upper extremity presented a significant limitation on the range of work plaintiff could perform. *See, e.g.*, *Buford v. Colvin*, No. C13-900-RSL, 2014 WL 33214, at *6-7 (W.D. Wash. Jan. 3, 2014) (ALJ erred in failing to call VE where claimant limited to occasional overhead reaching on the right). As the court in *Buford* explained, lower courts within the Ninth Circuit have come out both ways when considering whether reaching restrictions require VE testimony. *Id.* (collecting cases). The court, however, agreed with those cases requiring VE testimony based on SSR 85-15, which provides in relevant part:

> Reaching, handling, fingering, and feeling require progressively finer usage of the upper extremities to perform work-related activities. Reaching (extending the hands and arms in any direction) and handling (seizing, holding, grasping, turning or otherwise working primarily with the whole hand or hands) are activities required in almost all jobs. *Significant limitations of reaching or handling, therefore, may eliminate a large number of occupations a person could otherwise do. Varying degrees of limitations would have different effects, and the assistance of a VS may be needed to determine the effects of the limitations.*

SSR 85-15 (emphasis added). This Court agrees with the *Buford* court that the language of SSR 85-15 suggests that reaching limitations can be significant, and therefore the ALJ's conclusory finding that reaching limitation has "little or no effect on the occupational base of unskilled medium work" (AR 34) is unsupported by the record and thus erroneous.

The Court is not persuaded by the Commissioner's contention that the absence of a

discussion of reaching limitations in SSR 84-14 supports the ALJ's finding. *See Allen v. Barnhart*, 417 F.3d 396, 407 (3d Cir. 2005) (holding that "if the Secretary wishes to rely on an SSR as a replacement for a vocational expert, it must be crystal-clear that the SSR is probative as to the way in which the nonexertional limitations impact the ability to work, and thus, the occupational base."). Rather, as just discussed, SSR 85-15 indicates that reaching limitations can be significant, and thus the ALJ should have consulted a VE to determine the effect of plaintiff's limitation to occasional overhead reaching with the right upper extremity.

The Court, in sum, concludes that the ALJ erred in failing to obtain VE testimony. On remand, the ALJ should consult a VE to consider plaintiff's claim at step five.

**CONCLUSION**

For the reasons set forth above, this matter should be REMANDED for further administrative proceedings.

DATED this 12th day of March, 2014.

Mary Alice Theiler
Chief United States Magistrate Judge